(1) Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

LAURENCE SCHWEITZER, M.D.,

Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS, MICHAEL SERNIAK, FRED WRIGHT, THOMAS KOSTEN, JEFFREY LUSTMAN AND PAUL MCCOOL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

I Is There A Gap In The Law Permitting Government Employees Maliciously To Retaliate Against Former Employees With Impunity?

II The Issue Raised In This Case Is Not Addressed By The Holdings In *Seigert v. Gilley*, 111 S. Ct. 1789 (1991) and *Bush v. Lucas*, 462 U.S. 367 (1983); Indeed, Do Those Cases Suggest That Where, As Here, An Employee Refuses To Perform An Act He Regards As Unethical And Protests About A Matter Of Public Concern, And His Employment Ends, The Government Cannot Then Act To Retaliate Against Him With Impunity?

LIST OF PARTIES

The petitioner in the District Court and in the United States Court of Appeals for the Second Circuit is Dr. Laurence Schweitzer, a psychiatrist and resident of the State of Connecticut. At both the original trial in Connecticut Superior Court and the appeal to the Connecticut Supreme Court the defendant was Brian K. McMahon.

The respondents at both stages of this case were the Department of Veterans Affairs, and the following employees of the department: Michael Serniak, Fred Wright, Thomas Kosten, Jeffrey Lustman and Paul McCool. All individually named defendants are residents of the State of Connecticut.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Dr. Laurence Schweitzer, prays that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Second Circuit was rendered by Summary Order on November 26, 2001 and is reprinted here at App. A-1.

JURISDICTION

The United States Court of Appeals for the Second Circuit decided this case on November 26, 2001. This petition is brought within 90 days of that decision and is pursuant to Supreme Court Rule 13.1; 28 U.S.C. § 2101(c).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

> Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case comes before the Court after the District Court granted a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Thus, the statement of the case consists of the factual allegations of the Complaint. This is significant because in its decision, the Second Circuit failed to recite a key fact in this case: The petitioner had complained to his superiors prior to any adverse employment action that he was being asked, in effect, to engage in the unethical practice of increasing the use of in-patient services absent any showing of medical need.

Prior to April 1997, the petitioner, Dr. Laurence Schweitzer, had been employed for many years as a psychiatrist for the Department of Veterans Affairs, and had acquired an exemplary employment record. In April 1997, he was ordered to be transferred to a new Veterans Administration facility and was explicitly told by supervisors that his assignment was to increase the utilization of psychiatric services in order to increase revenue for the defendant Department of Veterans Affairs. Dr. Schweitzer expressed reservations about this assignment in that it required him to increase utilization of in-patient services

independent of any clinical demonstration of need for such service. Dr. Schweitzer told his superiors that the goals were unrealistic. He further asked his superiors to provide him further guidance in writing.

In October 1997, Dr. Schweitzer's superiors told him for the first time that there were irregularities in the manner in which he prescribed prescription medications. Thereafter, Dr. Schweitzer's superiors conducted a secret review of a series of his files in which they concluded that he was placing patients in imminent danger by the manner in which he prescribed certain medications. No formal finding in support of this conclusion was prepared.

On June 18, 1998, Dr. Schweitzer was summoned to a meeting with senior administrators of the Department of Veterans Affairs in Connecticut. He was given a letter rescinding his privilege to prescribe medications. Dr. Schweitzer was told that he could not come back to work because of the lack of ability to prescribe medications, and was given a brief period to respond to the charges.

Before Dr. Schweitzer was given any meaningful opportunity to respond to these allegations, senior administrators of the Department of Veterans Affairs caused letters to be sent to his patients reassigning them to other psychiatrists and informing them that he would not be returning to treat them in the future.

Dr. Schweitzer retained medical experts at his own expense who confirmed that there was nothing wrong with the manner in which he prescribed medications. The Department of Veterans Affairs refused to consider the

findings of Dr. Schweitzer's experts, and refused to permit him to resume prescribing medication or otherwise treat patients.

On or about August 1999, the Department of Veterans Affairs reached a formal determination upholding the original charges against the plaintiff.

As a direct and proximate result of the defendants' failure to provide Dr. Schweitzer with any meaningful opportunity to rebut the charges against him, he did not return to work after the June 1998 meeting, and his contract with the defendant Department of Veterans Affairs expired on November 18, 1998.

Since November of 1998, employees of the Department of Veterans Affairs tortiously interfered with Dr. Schweitzer's ability to obtain work by providing negative information about him to prospective employers.

The acts of the defendant were inspired by malice and were the result of Dr. Schweitzer's protest of being asked to go to Bridgeport Hospital and increase use of psychiatric services absent any showing of medical need. The defendant acted in such a manner as to chill Dr. Schweitzer in the exercise of his First Amendment rights. Dr. Schweitzer sought relief in part for a deprivation of his liberty interest arising under the Fourteenth Amendment to the United States Constitution.

REASONS FOR GRANTING THE WRIT

I. There Is A Gap In The Law Permitting Government Employees To Retaliate Against Former Employees With Impunity

Simply put, there is a hole in the law through which Dr. Schweitzer has been permitted to fall. This case permits consideration of whether that gap should be filled, and justice done when Government employees seek to retaliate against a former employee who no longer is in the employ of the Government.

A. Governmental Immunity Shields Individually Named Defendants From Claims Of Defamation and Tortious Interference With Contractual Relations

At some point, this Court will have to contend with the paradox implicit in our law: We are a constitutional republic saddled with the expectations and blinders of medieval Europe. How else are we to explain the legacy of sovereign immunity in its various forms? Government is our creation, yet it has placed itself beyond the reach of ordinary persons seeking justice in mundane cases. This organic view of the State and of the rights individuals have against it disregards the basic facts of our national heritage as expressed in the Declaration of Independence and, more specifically and poignantly, in the Ninth Amendment: Government is the tool of the People, not

the anvil on which the People's expectations are beaten into respectable form.[1]

In this case, Dr. Schweitzer cannot sue those who have sought to deprive him of the right to work. The Federal Tort Claim Act, 28 U.S.C. § 2680 (1998), explicitly states: "The provisions of this chapter . . . shall not apply to . . . (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." Thus, a Government employee is beyond the reach of justice for any of the common law state torts enumerated by statute.

B. Because The Petitioner's Employment Contract Had Expired, He Had No Property Interest in His Employment Sufficient To Support A *Bivens* Claim Arising Under The Fourteenth Amendment

This Court has permitted individuals to seek justice for the deprivation of Constitutional rights against Government employees. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988). Such cases can be raised under the Fifth Amendment's guarantee of due process of law, for example, when there is a claim that the Government has deprived a person of a property interest. However, no property interest can succeed on the basis of

---

[1] The Ninth Amendment remains a dead letter in our law, yet its language is clear. The people have reserved certain rights. Charles L. Black Jr. argues this point with elegance in *A New Birth of Freedom* (Grosset/Putnam, 1997).

a mere expectancy in future employment, and no claim can arise in cases in which the employment relationship has already ended, as is the case here. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).

C. Because The Petitioner's Employment Had Already Ended, He Was Unable To Seek Any Administrative Remedy For The Injury He Suffered At The Hands Of Government Actors

There are, indeed, administrative regulations a person can invoke to address employment-related grievances. 38 U.S.C. § 7462, *et seq.* Thus, in cases in which a person seeks to vindicate an employment-related right, this Court has ruled that "[b]ecause such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States, we conclude that it would be inappropriate for us to supplement that regulatory scheme with a new judicial remedy." *Bush v. Lucas*, 462 U.S. 367, 368 (1983).

In this case, the petitioner was unable to raise a grievance about the post-employment acts of his former supervisors because his employment relationship had ended.

D. Because The Petitioner's Contract Had Not Been Renewed The Petitioner Could Raise A Claim That Government Actors Deprived Him Of A Liberty Interest, But Only If He Could Prove That The Behavior Complained Of Was More Than Mere Defamation

The Fourteenth Amendment does permit a claim to be raised asserting a violation of a person's liberty interest. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) Thus, a person fired from public employment must be given an opportunity to "clear his name" if he is fired and stigmatizing charges are publicly disseminated about him. *Codd v. Vegler*, 429 U.S. 624, 628 (1977). Defamation per se is not a Constitutional tort. *Paul v. Davis*, 424 U.S. 693 (1976). Injury to one's reputation must be accompanied by some other act. *Wisconsin v. Constantineau*, 400 U.S. 433 (1971)(injury to reputation by posting a sign about a person's status as an alcoholic abridges liberty interest when accompanied by actual ban on the purchase of liquor). As the Second Circuit has held, there must be some "stigma plus." *Martz v. Incorporated Village of Valley Stream*, 22 F.3d 26, 31 (2d Cir. 1994). Thus, if an employee resigns, rather than being fired, there can, as a rule, be no liberty interest claim. *Siegert v. Gilley*, 111 S. Ct. 1789 (1991).

II. The Issue Raised In This Case Is Not Addressed By The Holdings In *Seigert v. Gilley*, 111 S. Ct. 1789 (1991) and *Bush v. Lucas*, 462 U.S. 367 (1983); Indeed, Those Cases Suggest That Where, As Here, An Employee Refuses To Perform An Act He Regards As Unethical And Protests About A Matter Of Public Concern, And His Employment Ends, The Government Cannot Then Act To Retaliate Against Him With Impunity

Unaddressed by the Second Circuit in its opinion below is a fundamental issue: When a plaintiff pleads retaliation for having protested about issues of public concern he raises more than a complaint about mere defamation. Under the holdings of *Seigert v. Gilley*, 111 S. Ct. 1789 (1991) and *Bush v. Lucas*, 462 U.S. 367 (1983), that should be enough to raise a claim.

In *Seigert*, this Court held defamation, by itself was insufficient to carry a liberty claim arising from a termination of public employment. *Id.*, p. 234. Central to the holding in *Seigert* was the fact that the plaintiff had voluntarily left Government employment. His former employers then wrote to his new employer expressing reservations about the man's competence.

On its surface, *Seigert* looks similar to the petitioner's case, but the similarity is only superficial. *Seigert* was a garden variety case of incompetence, and was the sort of routine decision made by a manager that Congress undoubtedly sought to keep immune from suit by its express prohibition under the FTCA of claims for defamation actions and interference with contractual relations. However, Congress evinced no such intent to permit corrupt Government officials to cover their tracks and

silence critics by reaching beyond the employment relationship to oppress whistleblowers.

Indeed, the Court's reasoning in *Bush v. Lucas*, 462 U.S. 367 (1983), suggests that the petitioner's case is exactly the sort of case in which this Court would approve of a remedy. There is no "elaborate remedial system" covering the acts taken against the petitioner. It is not the case, as occurred in *Gore*, that a Government employee served as a whistleblower, and then turned to the Courts first before seeking administrative relief. The petitioner here had no administrative relief available to him. His only recourse was to the Courts. Because the Federal Tort Claims Act does not drop the veil of immunity in cases arising out of defamatory acts, the petitioner was left with only one place to turn: the courts.

The facts as pleaded in this case allege more than mere defamation. They allege that a civil servant and professional objected to placing business planning purposes above his professional ethics. Because of that objection, he was drummed out of Government service. When his employment had ended, those whom he had challenged reached beyond the confines of the employment relationship to keep the petitioner silenced and to deprive him of the benefit of his professional license. Having thus armed themselves with the sword of defamation, they now seek the protection of immunity's shield. Nothing in this Court's jurisprudence suggests that the corrupt should enjoy immunity for their acts.

CONCLUSION

The Government urged below that the case be dismissed and the dismissal upheld because the petitioner had failed to raise more than a defamation claim. However, on the facts pleaded in this case, there was more than a mere defamation claim at issue. The petitioner had protested proposed Government waste and inefficiency. Shortly thereafter, adverse employment steps were taken against him that cost him his job. He did appeal to those administrative remedies that were available to him, and he lost. Thereafter, when his employment had ended, his former supervisors continued to discredit him in retaliation for his having defied them. The liberty plus test is satisfied in this case. The Government silenced a critic and then sought to assure that he remained forever silent within his chosen line of work.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 26 day of Nov., two thousand and one.

PRESENT:

HON. ROGER J. MINER,
HON. CHESTER J. STRAUB,
HON. BARRINGTON D. PARKER, JR.,

Circuit Judges,

LAURENCE SCHWEITZER,
Petitioner-Appellant,

-v.-

SUMMARY ORDER
No. 01-6067
(Filed Nov. 26, 2001)

DEPARTMENT OF VETERANS AFFAIRS, MICHAEL SERNIAK, FRED WRIGHT, THOMAS KOSTEN, JEFFREY LUSTMAN AND PAUL MCCOOL,

Respondent-Appellees.

Appearing for Petitioner-Appellant: Norman A. Pattis, New Haven, CT.

Appearing for Respondent-Appellees: Brenda M. Green (John A. Danaher III, Jeffrey A. Meyer on the brief), New Haven, CT.

Appeal from the United States District Court for the District of Connecticut (Alvin W. Thompson, *Judge*.)

AFTER ARGUMENT AND UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby AFFIRMED.

Plaintiff-Appellant Laurence Schweitzer, M.D. appeals from a judgment entered in the United States District Court for the District of Connecticut (Alvin W. Thompson, *Judge*) dismissing his complaint. Because we find that Schweitzer has failed to state a cause of action against the defendants under the doctrine of *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), we affirm the judgment of the District Court.

FACTUAL AND PROCEDURAL BACKGROUND

Schweitzer was employed as a psychiatrist by the Department of Veterans Affairs ("VA") for several years before his termination on November 18, 1998. In April of 1997, Schweitzer was transferred to a VA hospital in Bridgeport, Connecticut. Schweitzer objected to this

transfer and complained about the decision to the defendants.

In October 1997, Schweitzer was notified by Thomas Kosten and Jeffrey Lustman, both VA physicians, that they had reviewed Schweitzer's files and discovered irregularities in the manner in which he prescribed prescription medications. On June 18, 1998, Schweitzer was informed that Paul McCool, a VA administrator, had rescinded Schweitzer's privilege to prescribe medications. Although Schweitzer retained medical experts who concluded that there was nothing wrong with the way he prescribed medications, he was not permitted to resume working. In November 1998, Schweitzer's contract with the VA expired and was not renewed. Schwetizer then appealed the actions of the defendants within the VA administrative process. While the appeal was pending, the defendants reported to Schweitzer's former colleagues that he was suspended for suspected professional malpractice and provided negative information to at least three potential employers. In August 1999, the VA made a formal determination upholding the charges against Schweitzer.

Schweitzer filed a complaint in the United States District Court for the District of Connecticut on November 2, 1999 seeking monetary and injunctive relief against VA and the five individual defendants. The complaint alleged, *inter alia*, that the defendants defamed Schweitzer and tortiously interfered with his ability to obtain employment in violation of his due process rights. In addition, the complaint alleged that the defendants's actions constituted retaliation against Schweitzer with an intent "to chill the plaintiff in the exercise of his First

Amendment rights." These federal claims were brought under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b)-(c), 2671-2680, and the doctrine of *Bivens*, 403 U.S. 388. Finally, Schweitzer contends that the complaint also sets forth several state law tort claims.

The District Court, on February 21, 2001, dismissed Schweitzer's complaint, concluding that the FTCA did not recognize Schweitzer's claims against the individual defendants and against the VA, because "the exclusive remedy under the FTCA is against the United States of America." *Schweitzer v. Dep't of Veterans Affairs*, No. 3:99CV02148, Ruling on Motion to Dismiss (D. Conn. Feb. 21, 2001). Moreover, the court concluded that Schweitzer could not sustain a cause of action under *Bivens* because neither defamation nor tortious interference rise to the level of a constitutional violation. Finally, the court concluded that Schweitzer had failed to state a cause of action under state law and dismissed the complaint in its entirety. This timely appeal followed.

DISCUSSION

On appeal, Schweitzer does not challenge the District Court's dismissal of his FTCA claims. Instead, Schweitzer focuses on his contention that the defendants violated his due process rights by defaming his reputation to potential employers after his contract with the VA was not renewed. In addition, Schweitzer contends that the District Court abused its discretion by dismissing with prejudice his state law claims.

1. Constitutional Claims

Actions for damages are generally not available against the United States, federal agencies, or individual offices of the United States. In 1971, however, the Supreme Court held that the victim of a Fourth Amendment violation by federal officers could bring suit for money damages against the officers in federal court. *See Bivens*, 403 U.S. 388. So-called "*Bivens* actions" for damages against federal officers have subsequently been permitted for violations of the Due Process Clause of the Fifth Amendment, *Davis v. Passman*, 442 U.S. 228 (1979), and the Cruel and Unusual Punishments Clause of the Eighth Amendment, *Carlson v. Green*, 446 U.S. 14 (1980). In each of these cases, as in *Bivens* itself, the Court found that there were no "special factors counseling hesitation in the absence of affirmative action by Congress," no explicit statutory prohibition against the relief sought, and no alternative statutory remedy. *See Passman*, 442 U.S. at 246-47. And in its most recent decisions, the Supreme Court has "responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *FDIC v. Meyer*, 510 U.S. 471, 484 (1994) (quoting *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988)).

Turning to Schweitzer's specific claims, we find that the District Court correctly dismissed his claims against the VA because *Bivens* affords a remedy against only federal officials and precludes actions against federal agencies. *See id.* at 485-86 (stating that "the purpose of *Bivens* is to deter *the officer*" and concluding that "[a]n extension of *Bivens* to agencies of the Federal Government is not supported by the logic of *Bivens*").

We also find that Schweitzer's defamation claim against the individual defendants was properly dismissed, As held by the Supreme Court in a case factually indistinguishable from the case at bar, "defamation, by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation." *See Seigert v. Gilley*, 500 U.S. 226, 233 (1991). Schweitzer's defamation claim is therefore not actionable under *Bivens* and is at most a state law tort claim; as discussed below, such a claim was rightfully dismissed by the District Court.

We have also examined Schweitzer's other alleged federal claims and find them to be without merit for substantially the reasons set forth in the judgment of the District Court. Accordingly, we uphold the District Court's dismissal of Schweitzer's federal claims.

II. State Law Claims

Schweitzer's final argument is that the District Court abused its discretion when it reached the merits of his state law claims and dismissed them with prejudice. The court should have, Schweitzer contends, simply declined to exercise supplemental jurisdiction over the state claims after dismissing the federal claims. This would have allowed Schweitzer to refile the state claims in state court. We find this argument unavailing. First, the District Court did not err by retaining jurisdiction over Schweitzer's state law claims. Title 28 U.S.C. § 1367(c)(3) provides a district court with discretion to retain jurisdiction over a claim supported only by supplemental jurisdiction if it has dismissed all claims over which it had original jurisdiction. *See also* 16 James W. Moore et al.,

Moore's Federal Practice § 106.66[16-106] (3D ED 2001). Second, the District Court did not abuse its discretion in considering the merits of the state claims. Neither fairness nor judicial efficiency would have been furthered if the District Court had declined to address the merits of the state claims, since the court merely applied settled law and did not resolve any "novel or unsettled issues of state law." *Mauro v. S. New Eng. Telcomms., Inc.*, 208 F.3d 384, 388 (2d Cir. 2000) (upholding a district court's decision to retain jurisdiction over supplemental state claims after the sole federal cause of action had been dismissed, where declining jurisdiction over state law claims "would have furthered neither fairness nor judicial efficiency" and the state causes of action did not require the district court "to resolve any novel or unsettled issues of state law"). Having properly reached the merits of the state claims, the District Court correctly concluded that the Federal Tort Claims Act, 28 U.S.C. § 2679(b)(1), "provides [federal] government employees with immunity against claims of common law tort," so long as the employee was acting within the scope of his employment. *Rivera v. United States*, 928 F.2d 592, 608 (2d Cir. 1991). As Schweitzer conceded in his complaint that the defendants were acting within the scope of their employment, any state law tort claims alleged in his complaint must fail.

Accordingly, we affirm the judgment of the District Court.

FOR THE COURT:
ROSEANN B. MACKECHNIE, CLERK

/s/ Lucille Carr — 11/26/07
BY: — DATE:

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

LAURENCE SCHWEITZER, M.D.	:	
	:	
v.	:	CASE NO.
DEPARTMENT OF VETERANS AFFAIRS, MICHAEL SERNIAK, FRED WRIGHT, THOMAS KOSTEN, JEFFREY LUSTMAN, and PAUL McCOOL,	:	3:99CV2148 (AWT)

JUDGMENT

(Filed Feb. 26, 2001)

This action having come on for consideration of the defendants' motion to dismiss, before the Honorable Alvin W. Thompson, United States District Judge, and

The court having considered the full record of the case including applicable principles of law, and having filed a ruling on motion to dismiss, granting the motion, it is therefore,

ORDERED, ADJUDGED and DECREED that the judgment be and is hereby entered in favor of the defendants Department of Veterans Affairs, Michael Serniak, Fred Wright, Thomas Kosten, Jeffrey Lustman and Paul McCool, and this case is dismissed.

Dated at Hartford, Connecticut, this 26th day of February, 2001.

KEVIN F. ROWE, Clerk

By /s/ Sandra Smith
Sandra Smith
Deputy Clerk